IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Robert Eugene Mitchell, Jr., #1067195800909,) C/A No. 8:16-3709-TMC-JDA
	Plaintiff,)
VS.)REPORT AND RECOMMENDATION
Nancy Devine, Nikki Lyndsy, Chelesy L. Moore, William E. Phillips,))))
	Defendants.)) _)

Robert Eugene Mitchell, Jr. ("Plaintiff"), proceeding pro se, brings this civil action alleging a constitutional violation and a state law claim. Plaintiff is detained in the Anderson County Detention Center ("ACDC"), and he files this action *in forma pauperis* under 28 U.S.C. § 1915. The Complaint is subject to summary dismissal.

BACKGROUND

Plaintiff alleges he is incarcerated in the ACDC, and he apparently has pled guilty to a certain unspecified criminal offense(s).¹ [Doc. 1.] He alleges on August 10, 2016, in Anderson County, South Carolina, he "agreed to ple[a]d guilty to drug court." [*Id.*] He alleges that the sentencing judge "stated that the drug court sentence is both illegal and unconstitutional." [*Id.*] Plaintiff challenges the process of the drug court as being in violation of due process and the double jeopardy clause of the United States Constitution. [*Id.*] He seems to contend that the process provides that if the terms of drug court are violated, the

¹Based on attached copies of Anderson County sentencing sheets related to Plaintiff, it appears he pled guilty on August 10, 2016, to financial transaction card fraud, third or subsequent property crime, in violation of S.C. Code of Laws § 16-14-0060(a)(1-5), and PWID Meth 1st, in violation of S.C. Code of Laws § 44-53-375(B). [Doc. 1-1.]

original order by the sentencing judge is "done away with and the Solicitor's office makes a motion to the court for an amended order." [*Id.*] He seems to allege that this is a problem because he will be sentenced twice for the same offense. [*Id.*] He alleges that his former attorney William E. Phillips failed to object to the sentence and refused to file a complaint or motion raising the issues of the illegal and unconstitutional sentence. [*Id.*]

Plaintiff alleges he seeks to sue the following individuals: Nancy Devine, the state magistrate court judge and drug court administrator; Nikki Lyndsy, the drug court counselor for Anderson County summary court; Chelesy L. Moore, the Tenth Circuit Assistant Solicitor; and William E. Phillips, attorney at law who formerly represented Plaintiff in the criminal case. [*Id.*] He seeks \$30,000 for damages and an additional \$30,000 from William E. Phillips for his alleged malpractice. [*Id.*] Further, Plaintiff requests: release from incarceration without any further punishment based on the offenses for which he has already been sentenced; and, the offenses against him be removed from his record. [*Id.*]

STANDARD OF REVIEW

Pursuant to the provisions of 28 U.S.C. §636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(d) DSC, the undersigned is authorized to review the Complaint for relief and submit findings and recommendations to the District Court. Plaintiff filed this action pursuant to 28 U.S.C. § 1915, the *in forma pauperis* statute. This statute authorizes the District Court to dismiss a case if it is satisfied that the action "fails to state a claim on which relief may be granted," is "frivolous or malicious," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Further, Plaintiff is a prisoner under the definition in 28 U.S.C. § 1915A(c), and "seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C.

§ 1915A(a). Thus, even if Plaintiff had prepaid the full filing fee, this Court is charged with screening Plaintiff's lawsuit to identify cognizable claims or to dismiss the Complaint if (1) it is frivolous, malicious, or fails to state a claim upon which relief may be granted or (2) seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

As a pro se litigant, Plaintiff's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*). However, even under this less stringent standard, the pro se pleading remains subject to summary dismissal. The mandated liberal construction afforded to pro se pleadings means that if the court can reasonably read the pleadings to state a valid claim on which Plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999), or construct Plaintiff's legal arguments for him, *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

DISCUSSION

This Complaint is filed pursuant to 42 U.S.C. § 1983, which "is not itself a source of substantive rights," but merely provides 'a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). A civil action under § 1983 allows "a party who has been

deprived of a federal right under the color of state law to seek relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Defendant Nancy Devine ("Devine") should be dismissed from this action based on judicial immunity. It is well settled that judges have absolute immunity from a claim for damages arising out of their judicial actions unless they acted in the complete absence of all jurisdiction. See Mireles v. Waco, 502 U.S. 9 (1991); Stump v. Sparkman, 435 U.S. 349, 351-364 (1978); see also Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985) (explaining that if a challenged judicial act was unauthorized by law, the judge still has immunity from a suit seeking damages). Whether an act is judicial or nonjudicial relates to the nature of the act, such as whether it is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. Mireles, 502 U.S. at 12. Immunity applies even when the judge's acts were in error, malicious, or in excess of his authority. Id. at 12–13. Immunity presents a threshold question. See Harlow v. Fitzgerald, 475 U.S. 800, 818 (1982). Absolute immunity is "an immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

Here, Plaintiff alleges that Devine is the drug court administrator and that the drug court process is unconstitutional. Liberally construed, Plaintiff alleges that Devine has administered drug court with respect to his case. Administering the drug court program is alleged to be one of Devine's duties as a state magistrate court judge, and her alleged acts

are considered judicial acts because the parties allegedly dealt with the judge in her judicial capacity. Thus, because Devine's alleged misconduct arose out of her judicial actions, judicial immunity squarely applies, and she should be dismissed.

Defendant Chelesy L. Moore ("Moore") should be dismissed from this action based on prosecutorial immunity. In South Carolina, regional prosecutors are called Solicitors and Assistant Solicitors. Solicitors are elected by voters of a judicial circuit. See S.C. Const. art. V, § 24; and S.C. Code Ann. § 1-7-310. Prosecutors have absolute immunity for activities performed as "an officer of the court" where the conduct at issue was closely associated with the judicial phase of the criminal process. See Van de Kamp v. Goldstein, 555 U.S. 335, 341-45 (2009). For example, when a prosecutor "prepares to initiate a judicial proceeding", "appears in court to present evidence in support of a search warrant application," or conducts a criminal trial, bond hearings, grand jury proceedings, and pretrial "motions" hearings, absolute immunity applies. Id.; see also Buckley v. Fitzsimmons, 509 U.S. 259 (1993). Liberally construed, Moore's alleged wrongful conduct relates to her prosecution of the State's criminal proceedings against Plaintiff—perhaps in the guilty plea or sentencing proceedings. This alleged conduct is intricately related to the judicial process and to the prosecution of the State's case against Plaintiff. Therefore, Moore has absolute immunity from this suit, and she should be dismissed.

Defendant William E. Phillips ("Phillips") should be summarily dismissed from the § 1983 claim because he did not act under color of law. Plaintiff alleges that Phillips was his attorney during the criminal proceedings. An attorney, whether retained, court-appointed, or a public defender, does not act under color of state law, which is a jurisdictional prerequisite for any civil action brought under 42 U.S.C. § 1983. See Vermont v. Brillon,

556 U.S. 81, 91 (2009) (noting that a publicly assigned or privately retained counsel for a criminal defendant is not ordinarily considered a state actor); *Polk Cnty. v. Dodson*, 454 U.S. 312, 317–24 & nn. 8–16 (1981) (public defender); *Hall v. Quillen*, 631 F.2d 1154, 1155–56 & nn. 2–3 (4th Cir. 1980) (court-appointed attorney); *Deas v. Potts*, 547 F.2d 800 (4th Cir. 1976) (private attorney).

Additionally, the entire case should be dismissed because Plaintiff appears to attack his conviction and sentence that he is currently serving and that has not yet been invalidated. In *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), the Supreme Court pronounced,

... in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

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Further, the Supreme Court stated that,

... when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. This is known as the "favorable termination" requirement. See Wilson v. Johnson, 535 F.3d 262, 263 (4th Cir. 2008).

The *Heck* holding squarely applies to this case. Plaintiff alleges he pled guilty on August 10, 2016, to criminal offenses in Anderson County, and he received a sentence of drug court. He seems to also allege his sentence will be, or has been, altered because he violated the terms of drug court. Plaintiff does not allege that his state conviction has been invalidated, for example, by a reversal on direct appeal or a state or federal court's issuance of a writ of habeas corpus. A favorable determination on the merits of Plaintiff's § 1983 claim would imply that Plaintiff's criminal conviction and sentence, which he is currently serving, were invalid. Because Plaintiff has not alleged that he already has successfully challenged the lawfulness of his state court conviction, this § 1983 claim should be dismissed because a right of action has not accrued.²

Moreover, because Plaintiff does not clearly explain whether his state conviction and sentence are final or whether the criminal proceeding is still pending, this Court believes it should address the *Younger* abstention doctrine. To the extent the state criminal proceeding against Plaintiff is pending, *Younger* abstention should apply because Plaintiff is requesting this Court to find that the state drug court process is unconstitutional and thus interfere in the state proceeding. Because a federal court may not award injunctive relief that would affect pending state criminal proceedings absent extraordinary circumstances, this Court should abstain from interfering with it.

In Younger v. Harris, the Supreme Court held that a federal court should not equitably interfere with state criminal proceedings "except in the most narrow and

² Because a right of action has not yet accrued, the limitations period will not begin to run until the cause of action accrues. *See Morris v. Cardillo*, C/A No. 0:10-443-JFA-PJG, 2010 WL 2722997, at *2 (D.S.C. April 15, 2010), *adopted by* 2010 WL 2722992 (D.S.C. July 9, 2010).

extraordinary of circumstances." *Gilliam v. Foster*, 75 F.3d 881, 903 (4th Cir. 1996). The *Younger* Court noted that courts of equity should not act unless the moving party has no adequate remedy at law and will suffer irreparable injury if denied equitable relief. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); see also *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (explaining the circumstances when *Younger* abstention is appropriate).

From Younger and its progeny, the Court of Appeals for the Fourth Circuit has culled the following test to determine when abstention is appropriate: "(1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity to raise federal claims in the state proceedings." Martin Marietta Corp. v. Maryland Comm'n on Human Relations, 38 F.3d 1392, 1396 (4th Cir. 1994) (citing Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)). Here, it seems Plaintiff may be involved in ongoing state criminal proceedings. The second criterion has been addressed by the Supreme Court: "[T]he States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." Kelly v. Robinson, 479 U.S. 36, 49 (1986). The Court also decided the third criterion in noting "that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996) (quoting Kugler v. Helfant, 421 U.S. 117, 124 (1975)). This Court finds that Plaintiff should be able to raise his federal constitutional rights in the state proceedings. Therefore, to the extent Plaintiff seeks to enjoin the pending state criminal proceedings against him, this Court should abstain from hearing this action.

Also, Plaintiff seeks his release from incarceration, but release from prison is not available in this civil rights action. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (stating that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even

though such a claim may come within the literal terms of § 1983"); Preiser v. Rodriguez,

411 U.S. 475, 487-88 (1973) (attacking the length of duration of confinement is within the

core of habeas corpus).

Lastly, because this Court has federal question subject matter jurisdiction over the § 1983 claim, it appears this Court has supplemental jurisdiction over the state law claim of negligence or legal malpractice against William E. Phillips pursuant to 28 U.S.C. § 1367(a). However, because the federal question claim should be dismissed, the Court should decline supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367(c)(3).

RECOMMENDATION

It is recommended that the District Court dismiss this action without prejudice and without issuance and service of process. *See Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); and 28 U.S.C. § 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal). **Plaintiff's attention is directed to the important notice on the next page.**

December 13, 2016 Greenville, South Carolina S/Jacquelyn D. Austin United States Magistrate Judge

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk United States District Court 300 East Washington Street, Room 239 Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).